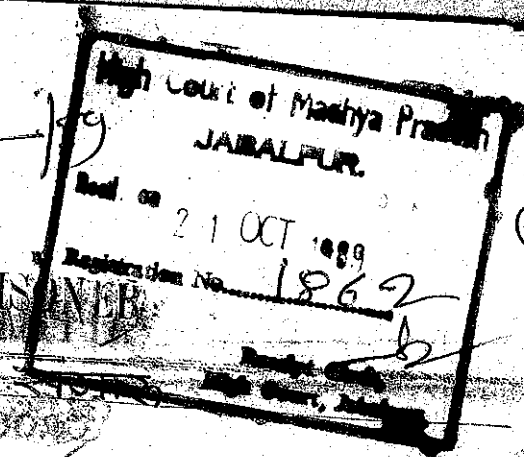




C.J.P.I. 50000-I-79

GA 1105



APPEAL OF PRISONER

No. 1882/44

Name

Father's name मलंग

Residence सोन-कुशवा, थाना-मालखोदा तहसील-सकती, जिला-बिलासपुर (म.प्र.)

Division Bench (Criminal)

Sentenced to आजीवन कारावास on 20-9-1989

Under section 302, 404 भा.दं.वि. by न्यायालय, सत्र न्यायाधीश, बिलासपुर (म.प्र.)

सत्र उद्घरण क्रमांक - 27/89

it is explained to the prisoner that if he states he wishes to be represented by a legal practitioner the Appellate Court will not proceed with the case for seven days unless the legal practitioner appears either. If the legal practitioner does not appear with in seven days he may not be heard at all. If the prisoner states that he does not wish to be represented by legal practitioner the court may proceed at once with the case and will not be obliged to give a hearing to any legal practitioner who should appear.

- 1 Date of Application for copy of Judgement निर्णय दिनांक को 5-10-89
- 2 Date of which copy received 5-10-89 हस्त प्रप्त कर जेल में लाया है।
- 3 Date on which Appeal sent -10-89
- 4 Whether the prisoner wishes to be represented or not yes/No.

No. 1882/44

Name समारु आ. मलंग

Continued in प्रथम श्रेणी जिला Jail बिलासपुर (म.प्र.)

No. 8119/प्रो. 89/बिलासपुर dated 9-10-89

Forwarded to the Deputy Commissioner C.J.M. Bilaspur (M.P.)

to gather which a copy of judgement or order passed in the case for favour of transmission to the proper Appellate Court,

Superintendent

अधीक्षक जिला जेल प्रथम श्रेणी बिलासपुर (म.प्र.)

Date of receipt in Deputy Commissioner's Office

Date of receipt of record to accompany

Memo of Appeal of the Appellate Court.

No. C/JM/89

dated

12/10/89

197

Forwarded to the Officer-in-charge Record Room Bilaspur for information & necessary action

Deputy Commissioner

Date of receipt in Appellate Court

अधीक्षक

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No. 1105/1989

Samaru

-Versus-

State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
Dilip Raosaheb Deshmukh
Judge

Hon'ble Shri Justice L.C. Bhadoo

Sd/-
L.C. BHADOO
Judge

Post for 25.06.2005

Sd/-
Dilip Raosaheb Deshmukh
Judge
06.2005

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No. 1105/1989

Samaru

-Versus-

State of Chhattisgarh

CORAM: HON'BLE SHRI L.C. BHADOO,
HON'BLE SHRI DILIP RAOSAHEB DESHMUKH, JJ

Shri Rakesh Jain and Smt. Kiran Jain, Advocates for the appellant.

State by Shri U.N.S. Deo, G.A. with Shri Akhil Mishra, Panel Lawyer.

J U D G M E N T

Per Dilip R. Deshmukh, J.

The appellant has assailed his conviction under Section 302 and 404 I.P.C. by the impugned judgment which was delivered by Shri R.K. Sharma in Sessions Trial No. 27/89 on 20.09.1989. The appellant has been sentenced to undergo imprisonment for life under Section 302 IPC and rigorous imprisonment for one year under Section 404 I.P.C.

2. It is not disputed that Godiram P.W. 4 is the son of deceased Rupotin Bai aged about 60 years.

3. Briefly stated the prosecution story is that Rupotin Bai and the appellant used to indulge in selling illicit country liquor in small quantity. However, some time before the occurrence, Rupotin Bai is alleged to have discontinued this illegal activity of selling country liquor. On 5.9.1988 at about 4.00 P.M., accused appellant went to the house of Rupotin Bai and asked her to accompany him for bringing liquor from Village Pirda. Godiram

P.W.4 heard this conversation and saw Rupotin Bai leaving with the accused appellant alongwith a plastic container of about 3 to 4 litres. Loknath P.W.5 who sold the illicit liquor to Rupotin Bai and the appellant saw Rupotin Bai and the appellant together at his house in the evening before the occurrence. Jethu P.W.2 who was working in his Badi also saw the appellant and Rupotin Bai together when the appellant stopped at about 5.00 to 5.30 P.M. in his Badi for a smoke. This was the last when Rupotin Bai was seen with the appellant. In the night, Hiralal P.W.6 who was inside his house heard the shouts of the appellant who was demanding beedi for smoking. Identifying his voice he did not come out and asked the appellant to leave since at that late hour Bidi would not be available.

4. Rupotin Bai did not return to her house. Godiram P.W.4 went to the house of appellant-Samaru at night and was told by the mother of the appellant that Samaru and Rupotin had not returned from Pirda. Next day, the mother of the appellant came to his house and asked him to find out the whereabouts of Samaru and Rupotin Bai.

5. At this point of time, the dead body of Rupotin Bai was seen by Jethu P.W.2 floating in the Darri Tank on the morning of 6.9.1988. He informed the Kotwar. Marg intimation was given by Phaniram which sparked the investigation. Meanwhile, Godiram P.W.⁴ on hearing the news of a dead body having been found in Darri Tank also went there and identified the dead body of his mother Rupotin Bai. Dr.Narendra Prasad Mishra P.W.9 who conducted the post-mortem examination on 7.9.1988 on the body of Rupotin Bai found that the body was swollen and was in early

stage of putrefaction. Eyes were oedematous and protruded. Cornea was hazy and congested. The pupils were dilated and the tongue was protruded and bitten in between the teeth. Blisters were present all over the body. Skin was peeled off over leg and abdomen. He found a bruise over the area of occipital scalp and left parotid region measuring 3" x 1". On internal examination, it was found that membrane, brain, spinal cord and pleura were congested. Larynx and trachea were congested and contained frothy mucus. Right and left lungs were also congested. On exposing the skin of neck a bruise in front of neck measuring ½" x ¼" on the left side of the neck was found. Dr. Mishra P.W.9 opined that duration of the death was within 34 to 36 hours before the autopsy. The injuries were ante mortem and death was due to asphyxia as a result of throttling. Nature of death and mode was homicidal.

6. On 8.9.88 Dr. Mishra P.W.9 also examined the accused appellant and found the following injuries:

- 1) There was scratching abrasion ½" below the left knee joint in anterior surface measuring 2" x 1" x 1/10 c.m. The injury was irregular in shape and its floor was healed.
- 2) There was abrasion ½" below the injury No.1 measuring 1" x ½" x 1/10" c.m. which was irregular in shape and the floor was healed.
- 3) There was scrotal swelling of right side measuring 6" x 3" x 3" in size which was indicative of hydrocoele of right side which was of duration of atleast one year.
- 4) There was no smegma present over the penis, which meant he had intercoursed or washed the smegma during bathing within 3 days.
- 5) No foreign hair was found around the pubic region.

7. Investigating Officer S.S.Parihar P.W.15 recovered and seized a pair of green plastic chappals belonging to the deceased from the

Darri Tank vide Ex.P.7. Head constable Kaleshram Bhardwaj P.W.13 apprehended the accused and recorded his memorandum Ex.P.3. At the instance of the accused-appellant, one lathi, one dark open shirt containing blood like stains, Rs.15/- in cash and one green coloured plastic container were seized from the house of the appellant. One underwear, one red lungi and one green lungi were also seized from the body of the appellant vide Ex.P.5. One empty black coloured plastic container of 5 litres was seized from the appellant vide Ex.P.6.

8. P.S.Paraste, Naib Tahsildar P.W.10 held the test identification of one pair of plastic chappal and two plastic containers. Godiram P.W.4 identified the plastic container, having been in use in the house vide Ex.P.13. On completion of investigation, the accused appellant was prosecuted for offences under Sections 302, 376, 201 and 404 I.P.C. Upon committal of the case by the Additional Chief Judicial Magistrate, the learned Sessions Judge framed charges under Section 302, 404 and 201 I.P.C. against the accused who abjured his guilt.

9. Prosecution examined the above mentioned witnesses. The learned Sessions Judge convicted the appellant for offence under Sections 302 and 404 I.P.C. on the basis of the following established links in the chain of circumstantial evidence:

- a) evidence of Godiram P.W.4, Loknath P.W.5 and Jethu P.W.2 that the appellant was last seen with Rupotin Bai in the evening before the occurrence.
- b) the recovery of plastic container of Rupotin Bai, one lathi, Rs.15/- and one shirt at the instance of the accused.

- c) the testimony of Dr. Narendra Prasad Mishra P.W.10 and post-mortem examination report Ex.P.10 whereby homicidal death of Rupotin Bai due to throttling was established.
- d) the fact that no explanation was offered by the accused regarding his whereabouts after having been last seen with Rupotin Bai in the evening before the occurrence.
- e) identification of the plastic container recovered at the instance of the accused by Godiram P.W.4.
- f) recovery of lathi at the instance of the accused vide Ex.P.4 and no explanation having been offered by the accused in this regard.

10. Learned counsel for the appellant mainly contended that the evidence relating to the appellant having been last seen with Rupotin Bai was not reliable. It was also not established by the prosecution that the container alleged to have been seized at the instance of the accused appellant belonged to the deceased. Since the time elapsed after the appellant was alleged to have been last seen with the deceased and the recovery of the dead body was more than 12 hours, the evidence of last seen was a very weak type of evidence and at the most created a suspicion which could not take the place of proof since no other link in the chain of circumstantial evidence was established. It was further contended that no motive has been established by the prosecution for the appellant to commit murder of Rupotin Bai.

11. On the other hand, the learned Govt. Advocate supported the judgment of trial Court on the ground that the prosecution evidence of the appellant having been last seen with the deceased in the evening before the occurrence clinched the issue and proved

beyond doubt that it was the appellant alone who had committed the murder of Rupotin Bai.

12. We have considered the rival contentions and have also perused the record minutely. The law relating to appreciation of evidence in a case resting upon circumstantial evidence is now well settled. Circumstantial evidence should always be consistent with the hypothesis of the guilt of the accused and inconsistent with the innocence. The chain of circumstances furnished by the prosecution should be so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused. Each incriminating circumstance used against the accused must be fully established and must be such so as to lead only to a singular hypothesis of guilt and exclude every possibility of innocence of the accused. Each link in the chain of circumstantial evidence must be fully established and the chain thus completed must be such that it is wholly consistent with the guilt of the accused and inconsistent with his innocence. The above law has been laid down by the Supreme Court in the case of Hanumanth Govind Nargundkar and Anr. Vs. State of Madhya Pradesh reported in A.I.R.1952 S.C. 343. In Dhananjoy Chatterjee v. State of W.B. reported in (1994) 2 SCC 220, the Apex Court has again laid down the law relating to appreciation of circumstantial evidence as under:

"In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as

not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

13. It was held in Bodhraj and others Vs. State of Jammu and Kashmir reported in 2002 (VIII) SCC 45 that so far as the evidence relating to last seen together is concerned, it merely provides a link in the chain of circumstantial evidence and is a weak type of evidence unless it is shown that the time elapsed since last seen with the deceased and the recovery of the dead body is so small that possibility of any person other than the accused being the author of the crime becomes impossible.

14. We shall first take up the evidence of last seen together as adduced by the prosecution and relied on by the trial Judge against the appellant. Godiram P.W.4 has deposed that in the evening at 4.00 P.M. the appellant had come to his house and asked his mother Rupotin Bai to accompany him to bring liquor from village Pirda whereupon Rupotin carrying a plastic container of about 3 to 4 litres had left with the appellant. Both Rupotin and the appellant did not return in the night whereupon Godiram P.W.4 went to the house of the appellant and learnt from the mother of the appellant that Samaru and Rupotin had gone to Pirda village but had not returned till then. He has further stated that on the morning of the next date mother of the appellant came to their house and asked him to find out the whereabouts of Samaru and Rupotin Bai. When he went to search them, information was received that there was a dead body in the Darri

Tank. Upon this, he went to the tank and found that it was the dead body of his mother Rupotin Bai.

15. The testimony of this witness has stood the test of cross-examination. Nothing has been elicited in his cross-examination to show that he bears any grudge against the appellant. It has been elicited in para 9 of cross-examination that Rupotin Bai used to sell country liquor in the village but she had given up this work since about 3 to 4 months prior to the occurrence. It appears that both the appellant and Rupotin Bai were indulging in the work of bringing country liquor from outside and selling in the village.

16. Loknath P.W.5 is the next witness. As per prosecution, he is the witness from whom the deceased and the appellant had purchased country liquor on the evening of 5.9.1988. To hide his complicity in this criminal activity, Loknath has carefully concealed this aspect of the trade which was undergoing and has only said that at about 5.00 P.M. in the evening before the date when the dead body of the Rupotin Bai was recovered, the appellant and Rupotin Bai came together but he did not have any conversation with them. He has also denied that Rupotin Bai and the appellant had purchased liquor from him. Nothing has emerged in cross-examination of this witness which would discredit the above testimony. Thus, the version that the appellant and the deceased were seen together in the evening before the recovery of dead body in village Pirda is fully trustworthy.

17. The next witness is Jethu P.W.2. He has deposed that on Monday (5.9.1988 fell on Monday) in the evening at about 5.00 P.M. while he was working in his Badi, Rupotin Bai and appellant came together. The appellant asked for fire and after smoking

Bidi, both the appellant and Rupotin Bai went towards village Pirda. On the next date when he was working in the same Badi, Pila called him from the Darri Tank. On going there, he saw a dead body floating in the Tank. In his cross-examination, it has not even been suggested that he did not see Rupotin Bai and appellant together in the evening before the occurrence or that the appellant had not asked for fire to smoke Bidi. Thus, the testimony of this witness is also reliable.

18. Hiralal P.W.6 has deposed that late night on Monday the accused appellant came before his house in village Khurda and shouted for Bidi whereupon identifying his voice he replied that Bidi would not be available so late in the night whereupon the appellant went away. The next day morning he heard the shouts that the dead body of the mother of Godiram i.e. Rupotin Bai was found in the Tank. Hearing this, he went to the Tank and saw that the dead body of Rupotin Bai was floating in the water. In cross-examination, no question has been asked which would render his testimony untrustworthy. On the contrary, it has been clarified in cross-examination that since it was late night and he had gone to sleep, therefore, when the appellant shouted loudly for beedi, he woke up since the appellant used to purchase Bidi from him on earlier occasions also. So the testimony of this witness clearly shows that in the night of Monday i.e. 5.9.1988, the appellant had gone to the house of Hiralal and from about 4.00 P.M. (as narrated by Godiram P.W.4) he was continuously with Rupotin Bai.

19. We have considered the testimony of Godiram P.W.4, Jethu P.W.2, Loknath P.W.5 and Hiralal P.W.6 and find that it inspires confidence and proves the factum of the appellant having been last

seen together with the deceased Rupotin Bai till evening of Monday i.e. 5.9.1988.

20. The recovery of the dead body of Rupotin Bai from the Darri Tank has been proved by head constable Kaleshram Bhardwaj P.W.13 which according to him was identified by Godiram to be the dead body of Rupotin Bai. This witness has proved Panchanama Ex.P.15 of the dead body of Rupotin Bai. Dr. Narendra Prasad Mishra P.W.9 who conducted the autopsy on 7.9.1988 on the dead body of Rupotin Bai found the duration of death to be 34 to 36 hours prior to the post-mortem examination which was conducted at 10.30 A.M. on 7.9.1988. It shows that death of Rupotin Bai must have been caused at about 10.30 P.M. on 5.9.1988. On or about this time the appellant went to the house of Hiralal asking for beedi. The testimony of Dr. Narendra Prasad Mishra P.W.9 has been dealt with in paragraph 5 of the judgment and establishes beyond doubt that Rupotin Bai had died a homicidal death due to Asphixia as a result of throttling. The fact that a bruise over the occipital area of scalp and left Parotid region measuring 3" x 1" was also found on Rupotin Bai goes to show that there was assault by some hard and blunt object. The presence of a bruise in front of the neck measuring 1 ½" x 1 ¼" on the left side of neck also clearly shows that the death was due to throttling. The fact that the tongue was protruded and bitten in between teeth also supports this inference. It is thus proved beyond doubt that Rupotin Bai had died a homicidal death.

21. Dr. Narendra Prasad Mishra P.W.9 had also deposed that on 8.9.1988 constable Ramkumar Mishra had brought the appellant

for examination and he found the following injuries over his person:

- 1) There was scratching abrasion $\frac{1}{2}$ " below the left knee joint in anterior surface measuring $2" \times 1" \times \frac{1}{10}$ c.m. The injury was irregular in shape and its floor was healed.
- 2) There was abrasion $\frac{1}{2}$ " below the injury No.1 measuring $1" \times \frac{1}{2}" \times \frac{1}{10}"$ c.m. which was irregular in shape and the floor was healed.
- 3) There was scrotal swelling of right side measuring $6" \times 3" \times 3"$ in size which was indicative of hydrocoele of right side of duration of atleast one year.
- 4) There was no smegma present over the penis, which meant he had intercourse or washed the smegma during bathing within 3 days.

22. To link the evidence of the appellant having been last seen with Rupotin Bai from about 4.00 P.M. in the evening of 5.9.1988 with the murder of Rupotin the injuries found on the appellant assumed tremendous importance. Medical evidence showed that the appellant had sustained these injuries in the night of 5.9.88. The duration of injuries sustained by the appellant was shown by Dr. Narendra Prasad Mishra P.W.9 to be 60 to 62 hours prior to 3.30 P.M. on 8.9.88 which clearly establishes that the appellant must have sustained the injuries late in the night of 5.9.1988 i.e. at about the same time when the homicidal death of Rupotin Bai took place. Thus it is fully established that Rupotin Bai and the appellant were last seen together from 4.00 P.M. on 5.9.1988 till evening and Rupotin Bai had died a homicidal death at about 10.30 P.M. on 5.9.1988 and the appellant had also sustained injuries mentioned above at about same time.

23. From the testimony of Godiram P.W.4, it is also established that the appellant had not returned to his house till the next morning i.e. 6.9.1988 when the mother of the appellant went to the

house of Godiram and asked him to find out the whereabouts of Samaru and Rupotin Bai. Kaleshram Bharadwaj P.W.13 has stated that the accused was found in the dilapidated house of another man on 7.9.1988. No explanation has been offered by the appellant in this regard.

24. Kaleshram Bharadwaj (P.W.13) had on the appellant's memorandum Ex.P.3 seized one lathi, one open shirt, Rs.15/- in cash and one green coloured plastic container from the accused vide Ex.P.4. Another black coloured empty container was also seized from the accused. Both these plastic containers were put to test identification by Godiram P.W.4 by P.S.Paraste, Naib Tahsildar P.W.10. This witness has stated that Godiram had identified the plastic container of Rupotin Bai. In the identification memo P.13, it has been mentioned that Godiram P.W.4 had identified only one plastic container on the ground that the same was container used in his house. This circumstance also establishes a link in the chain of circumstances fully established against the accused appellant.

25. From the foregoing discussions, we find that the following circumstances have been fully established by the prosecution against the appellant:

a) The appellant had gone to the house of Rupotin Bai and had asked her to accompany him for bringing liquor from Village Pirda whereupon Rupotin Bai had accompanied him.

b) The appellant was last seen with Rupotin Bai on Monday i.e. 5th September 1988 from 4.00 P.M. onwards till evening by Godiram P.W.4, Loknath P.W.5 and Jethu P.W.2.

c) Death of Rupotin Bai was homicidal and caused due to throttling. She had also sustained a bruise over the occipital area of scalp. Death of Rupotin Bai had occurred at about 10.30 P.M. on 5.9.1988 as per medical evidence.

d) The accused appellant had also sustained injuries at about same time i.e. around 10.30 P.M. of 5.9.88.

e) That the accused appellant thereafter went to the house of Hiralal P.W.6 to ask for Bidi.

f) That the accused did not return to his house on the night of 5.9.88 and his mother had on the morning of 6.9.88 gone to the house of Godiram and asked him to find out the whereabouts of the appellant and Rupotin Bai.

g) The appellant was apprehended not from his house but from the house of another person on 7.9.88 in village Kurda.

h) The plastic container carried by Rupotin Bai from her house and recovered at the instance of the accused on 7.9.88 was identified by Godiram P.W.2.

26. The above mentioned links in the chain of circumstantial evidence have been fully established and are of a conclusive nature and consistent only with the hypothesis of guilt of the accused appellant. The medical evidence establishes that death of Rupotin Bai took place at about 10.30 P.M. on 5.9.88. The accused appellant had also sustained injuries at about the same time. Thus the time elapsed since last seen together is in close proximity with the recovery of the dead body of Rupotin, and therefore, the circumstance of the accused appellant having been last seen together with Rupotin Bai can be fully relied on for establishing the guilt of the accused appellant for committing murder of Rupotin.

The other links to complete the chain of circumstantial evidences have also been fully established and lead only to the hypothesis of the guilt of the accused appellant.

27. In the ultimate analysis, in our considered opinion, the trial Court has rightly convicted the appellant for an offence under Section 302 of the I.P.C. So far as the conviction of the accused appellant under Section 404 I.P.C. is concerned, there is no evidence to the effect that the accused was found in possession of the purse of Rupotin Bai containing Rs.15/-. Therefore, the conviction of the appellant under Section 404 I.P.C. cannot be sustained.

28. In the result, the appeal is partly allowed. The conviction of the appellant under Section 302 I.P.C. and the sentence awarded thereunder are maintained. However, the conviction of the appellant under Section 404 I.P.C. and the sentence thereunder are set aside.

Sd/-
L.C. BHADOO
Judge
25.06.2005

Sd/-
SUNIL KUMAR SINHA
Judge
06.2005

Anjani